Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-1073

# in the Supreme Court of the United States

October Term, 1985

BLUE BELL, INC.,
*Petitioner*

*vs.*

FRANK E. WILHELM and HAROLD L. KOGUT,
*Respondents*

## Brief In Opposition To Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

Samuel M. Millette
Ernest S. DeLaney, III
DeLaney, Millette & McKnight, P.A.
Suite 100, 801 East Trade Street
Charlotte, North Carolina 28202

*Attorneys For Respondent*

BEST AVAILABLE COPY

23 pp

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE | 1 |
| THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI | 11 |
| A. This Case Presents No Special Or Important Reasons To Justify The Issuance Of The Writ | 11 |
| B. The Trial Court Correctly Denied Petitioner's Motions For A Directed Verdict And For Judgment Notwithstanding The Verdict | 12 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Brady v. Allstate Insurance Co.*, 683 F.2d 86, (4th Cir.), *cert. denied* 459 U.S. 1038 (1982) | 18 |
| *Galloway v. United States*, 319 U.S. 372 (1943) | 18 |
| *Lovelace v. Sherwin Williams Co.*, 681 F.2d 230 (4th Cir. 1982) | 12, 13, 14, 19 |
| *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) | 12 |
| *Swearngin v. Sears Roebuck and Co.*, 376 F.2d 637 (10th Cir. 1967) | 18 |
| *Tennant v. Peoria and P. U. Ry. Co.*, 321 U.S. 29 (1944) | 18 |


## OTHER AUTHORITIES


9 Wright and Miller, *Federal Practice and Procedure* §2524 at 541-42 (1971) ..... 18

## STATEMENT OF THE CASE

Plaintiffs, Frank Wilhelm and Karl Gatlin, commenced a civil action against the petitioner, Blue Bell, on September 3, 1982, alleging that each had been discharged by Blue Bell because of his age in violation of the Age Discrimination in Employment Act. 29 U.S.C. §621 *et. seq.* (the "ADEA"). At that time, Wilhelm was forty-nine years old and Gatlin was sixty-one years old. On April 11, 1983, the deposition of Harold Kogut, then a salesman for Blue Bell, was taken in Jacksonville, Florida. One month after giving his testimony, Kogut was fired by Blue Bell. Kogut intervened as a plaintiff in this case, alleging that he was discharged because of his age and in retaliation for his deposition testimony in violation of the ADEA. At the time Kogut petitioned the court to intervene, he was fifty-two years old and had been employed by Blue Bell for twelve years.

The case was tried before a jury, which on March 5, 1984, returned a verdict in favor of plaintiffs Wilhelm and Kogut, and against plaintiff Gatlin. Based upon the jury verdict the district court entered a judgment dismissing the claim of Gatlin and awarding relief to Wilhelm and Kogut.

During his first full year of employment, Wilhelm was the number one salesman in the nation for Blue Bell. Although he was assigned to one of the smallest territories in the nation by Blue Bell, Wilhelm consistently produced the largest sales volume of any salesman in the country. In 1978, Wilhelm achieved one hundred sixty-three percent of his quota and was selected by Blue Bell as the number one salesman in the country.

Blue Bell annually selected its ten best salesman in the nation and honored them by inducting them into an elite organization known as the "Top Ten Club". Wilhelm was selected for membership in the Top Ten Club by Blue Bell seven out of the almost nine years that he worked for the company. During his nine year tenure with Blue Bell, Wilhelm received one performance appraisal from the company and on that occasion, in July of 1979, his performance was rated as excellent. Wilhelm ranked number one in per capita sales for the Southeast Region eight out of the nine years that he was employed by Blue Bell.

In February of 1981, Bill Wise, the Regional Manager of the Southeast and Wilhelm's immediate superior, came to Asheville, North Carolina to go with Wilhelm to one of the biggest accounts in his territory, Sky City. On that occasion, Wilhelm questioned Wise as to personnel changes within the company and asked him what they meant. Wise replied "Well, Frank, eventually Blue Bell is going to have $15,000.00 a year college boys for salesmen. Blue Bell cannot stand these five and six percent commission rates, so in time they will have all young college guys on a salary being paid expenses and going around taking inventory in Blue Bell accounts." Just four months earlier, the second and third largest accounts in Wilhelm's territory had been taken from him and given to a salaried, non-commissioned account executive who was thirty-three years old.

In June of 1981, Wise asked Wilhelm to come to Atlanta to meet with him. At that conference Wise told Wilhelm that he was going to reduce Wilhelm's projected commission earnings by about $10,000.00 per year. When

Wilhelm inquired as to the reason for doing it, Wise replied, "Well, Frank, if you were to leave Blue Bell for any reason, I already know who your replacement would be. We would start him out at considerably less than the figure that we are talking about." Wilhelm then said, "Well, I guess the guy would probably be twenty years younger than I am too." Wise replied, "That's right."

In September of 1981, Wise told Wilhelm that he was placing him on probation. Wilhelm stated to Wise, "You know and I know what this is all about and the guys downstairs know what this is all about. Blue Bell is on a youth campaign. You want to get rid of the older guys and replace them with younger people." To that Wise replied, "Well, I personally am of the belief that older people tend to become complacent whereas younger people generally have more drive and ambition." Wise told Wilhelm "that he was going to take care of him first and then there were going to be some others", and specifically referred to a forty-two year old salesman named Ron Strickland, who subsequently was terminated by Blue Bell. Wise then assigned Wilhelm certain goals to be accomplished by December 4, 1981 or he would be fired. On December 4, 1981, Wise wrote to Wilhelm, acknowledging that Wilhelm had met the goals and praising him in glowing terms for his efforts and accomplishments.

In the last week of January 1982, Wise contacted Wilhelm and told him that he wanted to travel with him on the 2nd, 3rd and 4th of February. Wise inquired as to how sales were going and Wilhelm told him things had broken loose after the bad weather and he was

having an excellent week and had opened three new accounts. Wise said, "Great, I will see you next week." When Wilhelm met Wise on February 2, 1982, Wise said, "I have decided to let you go. You don't know how to do this job." At that time, Wilhelm was twenty-four percent ahead of his prior year sales and was the top salesman in the Southeast Region.

Wilhelm was replaced by Wayne Knighton, a twenty-four year old who had been hired by Blue Bell shortly before Wilhelm was placed on probation in September, 1981. As of January 29, 1982, Wilhelm had secured four new accounts (more than double the company standard), was twenty-four percent ahead of his prior year sales, was number one in the region in sales and was number eleven in the nation in sales out of eighty-five sales people. Such figures did not even take into account his sales for the last week in January. Had Wilhelm received credit for all of the sales he made, his actual percentage ahead of sales for the year before would have been thirty-four percent and his position nationally would have been number nine. Wilhelm actually opened twenty-nine new accounts, nine more than the company standard, in the year immediately preceding his termination.

At a sales meeting in Atlanta on December 30 and 31, 1981, Mr. Weymouth, the National Sales Manager, passed by several of the older salesmen and stated, "Are you old SOBs still with us? I thought we got rid of you at the last sales meeting." At the same meeting, Joe Glover, the regional sales manager who fired plaintiff Kogut, told Wilhelm that if he were his sales manager, "you are just the one I would get rid of. You have made too much money. I would replace you with some young guy that I didn't have to pay anything."

The jury determined that plaintiff Karl Gatlin did not file his charge of age discrimination with the Equal Employment Opportunity Commission within the time provided by the law, and accordingly, returned a verdict against him. Gatlin, though, was an important witness in the trial as to specific instances of age discrimination by the defendant.

When Gatlin was fired in 1981, he was told by his regional manager that his termination was due to poor performance. However, at the time of such firing, his sales were approximately thirty-seven percent above his sales for the previous year and he was second in the region in terms of attainment of quota. Gatlin had reached his sales quota in each of the years 1978, 1979 and 1980. These quota figures were particularly significant in view of the fact that when Gatlin first started with Blue Bell, he had all but two counties of South Carolina and also had forty-two counties in North Carolina. Little by little the territory was reduced until at the time of his firing he had no territory in South Carolina and only sixteen counties left in the western tip of North Carolina. Such quota and volume figures were also significant in view of the fact that an important account was taken from him in 1977 to whom he had sold over one million dollars worth of merchandise in a single year and the fact that in 1979 his largest customer was taken away from him and such customer represented $3.4 million in sales in the year before. Nevertheless, Gatlin was number one in sales volume in 1977 in the Southeast Region, number one in sales volume in the Southeast Region in 1978, and number three in sales volume in the Southeast Region in 1979. When Gatlin was fired, he was replaced by a man approximately forty-one years of age.

Gatlin had a meeting with Harold Silkworth, a vice president of Blue Bell, on July 12, 1983. On that occasion, in discussing the names of salesmen missing from the sales bulletin, Silkworth said, "It looks like Blue Bell is getting rid of all the older people. . ." Silkworth stated that George Montgomery, a former vice president of Blue Bell, was fired because of his age. Silkworth told Gatlin directly that he was fired because of his age and for no other reason. Silkworth stated, "Karl, you were fired because of your age. Your performance is well known by anyone who has been with Blue Bell in the area of sales; the records here show that, and it was well known by those people that caused you to be fired."

Plaintiff Kogut had worked for Blue Bell as a salesman in Florida since May 1, 1971. In March of 1983, plaintiffs caused a subpoena to be served on Kogut to take his deposition in the instant lawsuit, which had been filed by plaintiffs Wilhelm and Gatlin. The subpoena that was served on Kogut required him to be present for his deposition in St. Petersburg, Florida on April 12, 1983. An additional subpoena had been issued by the plaintiffs to take the deposition of another Blue Bell salesman in Jacksonville on April 11, 1983. On April 6, 1983 plaintiffs' counsel contacted Kogut by telephone and asked if it would be convenient for Kogut to come to Jacksonville on April 11, 1983 to give his deposition rather than have a number of people go from Jacksonville to St. Petersburg for his deposition. Kogut stated that it would be convenient for him to do that and the next morning notified Mr.Williams of the Blue Bell legal department and Joe Glover, his immediate supervisor, of such change.

At the time Kogut agreed to give his deposition in Jacksonville on April 11, 1983, he had no schedule conflicts with his other Blue Bell duties. Kogut testified that after he made the commitment to give a deposition, he was threatened by Joe Glover, his immediate supervisor, and told "that if I went to Jacksonville to give the deposition, as far as he was concerned, that's insubordination and grounds for termination." Nevertheless, Kogut appeared and testified at the deposition as follows:

1. that older Blue Bell salesmen were the subject of harassment and intimidation by their superiors.

2. "that guys who had been around awhile who appeared to be a little older were gone and they had a lot of new kids brought in—young guys."

3. that Kogut, himself, had been the subject of age related remarks such as: "Well, what do you expect at your age?" . . . "Well, look at Kogut he's been around here so long." . . . "Well, the oldest guy we've got here is Kogut."

4. that Bill Wise, the regional sales manager for Boys Wear stated that "the sales force was going to be a bunch of young college kids driving company Chevrolets", and also stated that "Young guys are more aggressive. They are more hungry. You older guys run out of steam and you get complacent after you've been here for awhile."

5. that Jerry Poole, President of Boys Wear, told him "You have to understand that Bill Wise is of the opinion that younger guys can do an "h" of a better job than you older guys. You guys get complacent after being around a long time."

6. that Dave Butts, presently a district manager for Boys Wear, but formerly a regional manager, stated that he had been forced by the company to fire older salesmen.

The day following his deposition, Kogut was confronted and berated by his immediate supervisor, Joe Glover, for giving the deposition, and Glover continued his tirade until Kogut told him, "my personal attorney has advised me that I don't have to take any harassment or intimidation regarding the federal deposition that I have given. I said to him, if you don't stop it, I'm going to respectfully get up and walk out." Kogut received a certified letter from Glover on May 9, 1983, regarding his attendance at the deposition:

> Hal, this action is insubordination, and is a very serious violation of company policy. Insubordination will not be tolerated. In fact, insubordination is grounds for immediate termination.
>
> Since your failure to appear in St. Pete was due to the fact that you were attending a deposition in Jacksonville, I have decided to give you the benefit of the doubt about your perception of your obligation to attend the deposition on Monday instead of Tuesday. And,

> because of this misperception, I am warning you about your insubordination instead of terminating you.
>
> Hal, let's put this problem in the past and let's work together in pursuing the goals and objectives of your territory.

Six days after receiving the letter, Kogut was fired by Glover, and Glover testified at trial that he had determined to fire Kogut at the time that he wrote the letter. Thereafter, a man twenty-eight years old was employed by Blue Bell to take Kogut's job.

At the time Kogut was fired, he was number one in the region in accomplishing percent of sales quota. Kogut was at seventy-eight percent of quota and there was approximately four and a half months left in the fiscal year:

> Q. [By Mr. Millette]: Tell me what Mr. Kogut's percent of quota was?
>
> A. [By Mr.Glover]: On May 19th, his percent of quota was seventy-eight percent.
>
> * * *
>
> Q. So you fired the top man as far as quota is concerned?
>
> A. That is correct.

At the time of his firing, he was number two in acquiring new accounts in the entire Southeast Region and had

led the region in new accounts in every year since 1978.

In September of 1981, Kogut learned that Wilhelm had been put on probation by his manager, Bill Wise. The other salesmen in the southeast region were concerned because Wilhelm was the top salesman in the region as to business accomplished. They asked Kogut, as the senior salesman, to contact Jerry Poole, the president of the Boys Wear Division, about the situation. Poole told Kogut, "Hal, you have to understand that Bill Wise is of the opinion that younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around awhile and run out of steam." Thereafter, Kogut contacted Bill Wise, the regional sales manager. Wise told Kogut that Poole had accurately characterized his feelings and further stated, "that in the not too distant future, all Wrangler salesmen will be young, college boys, driving leased Chevrolets, taking inventories on big Wrangler accounts."

In late October of 1982, Kogut contacted his regional manager, Bill Wise, by telephone and advised him of competitive information where a competitor was giving extended payment terms to Blue Bell customers. Wise thanked Kogut and told him to put it in the form of a memo, stating, "That way I can pass it on to Weymouth and that way it can help the both of us. After all, we've got to try to slide you by for another two and a half years." Kogut was over fifty-two years old at the time and the early retirement date had just been changed by Blue Bell from age sixty to age fifty-five.

## THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI

### A. This Case Presents No Special Or Important Reasons To Justify The Issuance Of The Writ

Rule 17 of the Supreme Court Rules emphasizes that review by the Supreme Court on a writ of certiorari is a matter of judicial discretion and "will be granted only when there are special and important reasons therefor." In the instant case Blue Bell asks this court to exercise its discretionary power of review in order to address the "significant federal issue" of "proper jury control in age discrimination cases." (Petition at 14). Blue Bell does not cite a conflict within the circuits nor a decision of the Fourth Circuit in conflict with a state court of last resort in support of its request for discretionary review by this court. In fact, petitioner does not point to a single case from any circuit in support of its position. Instead, Blue Bell urges this court to grant certiorari based upon its speculation that many lawyers and judges perceive that juries "may too easily and improperly be persuaded" in age discrimination cases. (Petition at 16).

Petitioner asserts that the instant case is a peculiarly appropriate vehicle for addressing the issue of "uncontrolled" juries who decide age discrimination claims on the basis of "sympathy" for the plaintiffs. Petitioner neglects to note, however, that the same jury, which was allegedly "overly sympathetic" to plaintiffs Wilhelm and Kogut, returned a verdict *against* plaintiff Gatlin. In fact, the jury determined that Blue Bell had willfully discriminated against Gatlin on the basis of his age, but refused to award him damages because it

found that he had waited too long to file his charge of discrimination with the Equal Employment Opportunity Commission. Instead of basing its verdict on sympathy, the jury scrupulously followed the trial court's instructions and refused to award damages to Gatlin even though it determined that Blue Bell had practiced willful age discrimination against him.

### B. The Trial Court Correctly Denied Petitioner's Motions For A Directed Verdict And For Judgment Notwithstanding The Verdict

Blue Bell asserts in its petition that the Fourth Circuit "articulated the proper standards for review of jury verdicts" in the case of *Lovelace v. Sherwin Williams*, 681 F.2d 230 (4th Cir. 1982), but failed to adhere to those standards in the case at bar. However, the Fourth Circuit relied extensively on *Lovelace* in rendering its opinion below. *See* Appendix at 8-11, 19-20. In fact, not only is *Lovelace* consistent with the decision of the Fourth Circuit in the instant action, it virtually mandates such a ruling.

In *Lovelace* the plaintiff in an ADEA action attempted to establish his claim of age discrimination by relying only on the prima facia proof scheme established by this court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. He was not able to produce any direct evidence of a stated purpose by the defendant to disfavor because of age nor to produce any indirect evidence whose cumulative probative force would support a reasonable probability of age discrimination. 681 F.2d at 242. In addition, after the defendant articulated a legitimate, non-discriminatory reason for plaintiff's demotion, the plaintiff was unable

to come forward with any evidence showing the defendant's stated reasons to be pretextual. In such a situation the Fourth Circuit ruled that the granting of judgment notwithstanding the verdict was proper.

The Fourth Circuit also held in *Lovelace* that direct evidence of age discrimination was sufficient, by itself, to enter a judgment for an ADEA plaintiff and to overcome a motion for a directed verdict or a judgment notwithstanding the verdict. The *Lovelace* court stated that in ruling on an evidence sufficiency motion in an ADEA action:

> The first question [for the trial court] is whether plaintiff's evidence may have carried the original production burden without need to evoke the *McDonnell Douglas* presumption. This may have occurred, for example, through direct evidence of a stated purpose to disfavor because of age . . . If this is the judicial assessment, inquiry of course ceases, no further production burdens are put in play, and the motion can be denied.

681 F.2d at 240. The *Lovelace* court later reiterated that direct evidence of a stated purpose to disfavor because of age was sufficient to support a jury verdict:

> The logical starting point in ruling upon the defendant's motion for judgment n.o.v. is to consider whether claimant may have carried his original production burden on the motivational issue without need for resort to the McDonnell Douglas presumption with all its ensuing complexities. This might

have been done by direct evidence of age discrimination . . . .

681 F.2d at 242

In the case at bar plaintiffs introduced overwhelming direct evidence demonstrating that age was the motivating factor in the discharge of each plaintiff. The uncontradicted evidence in the case demonstrated that high officials of Blue Bell on numerous occasions voiced a preference for younger employees as opposed to older employees and expressed an intention to replace older employees with younger employees. In fact, the evidence tended to show that Blue Bell acted against plaintiffs because of their age and for no other reason.

The Fourth Circuit was so impressed with the substantial quantity and quality of the direct evidence of age discrimination presented by plaintiffs at trial that it recounted the evidence at length in its opinion:

> The plaintiffs introduced ample direct evidence of age discrimination suggesting that Blue Bell fired them because of their ages. This direct evidence of age discrimination consisted of testimony relating how various Blue Bell officials had indicated an intent to replace older salesmen with younger salesmen. For example, plaintiffs introduced evidence of a conversation between Wilhelm and his immediate supervisor, William Wise, in February 1981, less than one year before Wilhelm's discharge, relating to various personnel changes in the company. Wilhelm testified that Wise told him that "eventually Blue Bell is going to

have $15,000 a year college boys for salesmen . . . . Blue Bell cannot stand these five and six percent commission rates; so, in time they will have all young college guys on a salary, being paid expenses and going around taking inventory in Blue Bell accounts."

The plaintiffs also introduced evidence of a conversation between Wilhelm and Wise in September 1981 when Wise placed Wilhelm on probation. At that time Wilhelm protested that his performance was better than the other salesmen in the Region and accused Blue Bell of being "on a youth campaign" and wanting "to get rid of the older guys and replace them with younger people." Instead of denying that accusation, Wise confirmed that he believed that "older people tend to become complacent whereas younger people generally have more drive and ambition." Wilhelm testified that Wise told him that "he was going to take care of him first and then there were going to be some others."

Kogut testified that in September or October 1981 Wise conceded that he believed that "younger salesmen do a much better job than older salesmen." According to Kogut, Wise further stated that "in the not too distant future, all Wrangler salesmen would be young, college boys driving leased Chevrolets, taking inventory on big Wrangler accounts." Kogut testified to these statements by Wise while he was a Blue Bell employee and prior to becoming a plaintiff in this case.

Wilhelm and Kogut testified that they informed Jerry Poole, the president of the Boyswear Division of Blue Bell, about the statements made by Wise that younger salesmen do a much better job than older salesmen and that the future Blue Bell salesman would be a young college boy. According to Wilhelm and Kogut, in each instance Poole responded, "That really doesn't bother me too much." At trial Poole admitted that Wilhelm and Kogut had informed him of Wise's age related remarks prior to their termination and that he had, in fact, responded to each that the statements did not bother him. Poole explained that these threats to terminate older salesmen and replace them with "college boys" did not bother him because he was not "going to let it happen." Furthermore, the uncontradicted evidence at trial established that when Poole was first informed that Wise had placed Wilhelm on probation in September 1981, five months prior to his firing, Poole responded, "you have to understand that Bill Wise is of the opinion that the younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around a while and run out of steam."

Wise ceased to be Kogut's manager and was replaced by Joe Glover. The plaintiffs offered evidence that in December 1981 Glover told Kogut, Wilhelm and another Blue Bell salesmen that "Blue Bell doesn't want salesmen with good records anymore . . . . They want young

> men who can do the work for a lot less money." The plaintiffs further offered evidence that in December 1981, one month prior to Wilhelm's firing, the National Sales Manager of Blue Bell, Ed Weymeth, approached Wilhelm, Kogut and one other older salesman and said, "My God, [are] you old guys still around. I thought we got rid of you at the last sales meeting."

Appendix at 14-19.

Plaintiffs in the case at bar presented blatant, uncontradicted evidence of age discrimination—evidence that conclusively demonstrated that Blue Bell acted against each man solely because of his age. Blue Bell's assertion in the petition that the direct evidence was "ambiguous and entirely circumstantial" is simply ludicrous. (Petition at 29). The unrefuted evidence established that both Wilhelm and Kogut were informed by their immediate superior, Bill Wise, that the older Blue Bell salesmen would be replaced by young college boys. Each reported these age biased statements to the president of the division who replied in each instance, "That really doesn't bother me." The president admitted at trial that he had, in fact, responded to each that the statements did not bother him. The uncontradicted evidence showed that this same president candidly explained that Wilhelm's probation was due to the fact that his immediate superior, Bill Wise, was of the opinion that younger salesmen do a much better job than older salesmen. Four months later Wise fired Wilhelm. The evidence demonstrated that the regional manager who fired Kogut had previously told a group of salesmen that Blue Bell did not want older salesmen with good records, but rather younger salesmen who could do the

work for less money. In fact, plaintiffs offered uncontradicted evidence that during the nine-year period from 1974 to 1983 every salesman hired by Blue Bell in the southeast region was under age forty.

The legal standard for determining whether the evidence is sufficient to support a jury verdict is the same, whether it arises in the procedural context of a motion for a directed verdict or of a motion for judgment notwithstanding the verdict. 9 Wright and Miller, *Federal Practice and Procedure* §2524 at 541-42 (1971). In determining whether the evidence is sufficient the trial court is not free to weigh the evidence nor to pass on the credibility of witnesses nor to substitute its judgment of the facts for that of jury. *Tennant v. Peoria and P. U. Ry. Co.*, 321 U.S.29, 35 (1944); *Swearngin v. Sears Roebuck and Co.*, 376 F.2d 637, 639 (10th Cir. 1967). Instead, it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Galloway v. United States*, 319 U.S. 372, 395 (1943). The standard for determining whether the evidence is sufficient to support a jury verdict is "whether viewing the evidence in the light most favorable to the appellee-plaintiff, there is substantial evidence to support the jury's findings." *Brady v. Allstate Insurance Co.*, 683 F.2d 86, 89 (4th Cir.), *cert. denied*, 459 U.S. 1038 (1982). The Fourth Circuit correctly ruled that the overwhelming direct evidence of age discrimination presented by plaintiffs in the instant action was sufficient to support the jury verdict:

> We conclude that there is substantial evidence in the record to support the jury's findings that Blue Bell discharged Wilhelm and Kogut

> because of their ages. The plaintiffs introduced ample direct evidence of age discrimination from which the jury could have concluded that Blue Bell fired Wilhelm and Kogut because of their ages. This direct evidence of age discrimination, if believed by the jury, was sufficient by itself to support a verdict for the plaintiffs and, concomitantly, to survive a motion for a directed verdict or a judgment notwithstanding the verdict. *Lovelace v. Sherwin Williams*, 681 F.2d at 240.

Appendix at 19.

## CONCLUSION

This Court should deny the petition for a writ of certiorari. It presents no special or significant issue that would justify the exercise of this Court's discretionary power of review. The jury verdict in the case at bar was supported by abundant direct evidence of age discrimination demonstrating that petitioner proceeded against the plaintiffs solely because of their ages. This direct evidence was sufficient to support a jury verdict and to overcome a motion for a directed verdict or a motion for judgment notwithstanding the verdict.

Respectfully submitted, this 17th day of January, 1986.

Ernest S. DeLaney III
Samuel M. Millette
DELANEY, MILLETTE &
MCKNIGHT, P.A.
Suite 100, 801 East Trade Street
Charlotte, N.C. 28202
Telephone: (704) 372-9990

*Attorneys For Respondent*